**PHILIP LAU CHEE HENG**

**v.**

**PUBLIC PROSECUTOR**

HIGH COURT BORNEO
CHONG SIEW FAI J
[CRIMINAL APPEAL NO. 9 OF 1987]
23 MARCH 1988

***CRIMINAL LAW:*** *Sentence - Charge under s. 4 of the Firearms [Increased Penalties] Act 1971 - Whether life imprisonment mandatory - Whether Court had power to enhance sentence on a revision.*

The appellant pleaded guilty to a charge of exhibiting a firearm in a manner likely to put a person in fear of death at the time of committing a robbery on 26 September 1986 contrary to s. 4 of the Firearms (Increased Penalties) Act 1971. He was sentenced to 3 years' imprisonment and 6 strokes of whipping. The appellant appealed against sentence alleging that the 6 strokes of whipping was manifestly excessive.

The Public Prosecutor wrote to the Court seeking a revision of the case submitting that the 3 years' imprisonment was unauthorised and illegal in view of the mandatory sentence imposed by s. 4 of the Act.

**Held:**

**[1]** That after considering all matters the Court was of the view that the penalty of imprisonment for life and of not less than 6 strokes of whipping under s. 4 of the Firearms [Increased Penalties] Act 1971 were upon conviction mandatory and therefore the term of imprisonment imposed by the Learned Sessions Court Judge was clearly wrong and unsustainable.

**[2]** That while the general rule is that the High Court in revision does not enhance a sentence even though illegality was committed by the lower Court, where the sentence passed involves substantial punishment, the Court would nevertheless have to act where the sentence is improper and not in accordance with the law.

**[3]** Sentence altered to life imprisonment and the 6 strokes of whipping affirmed.

**Cases referred to:**

*Public Prosecutor v. Man bin Ismail [1939] MLJ 161*
*Public Prosecutor v. Lee Ah Sam [1949] 15 MLJ 236*
*Ng Chwee Puan v. Reg. [1953] 19 MLJ 86*
*Khor Seek Pok v. Public Prosecutor [1958] 24 MLJ 170*
*Public Prosecutor v. Wahab [1964] 30 MLJ 265*
*Darus v. Public Prosecutor [1964] 30 MLJ 322*
*Jayanathan v. Public Prosecutor [1973] 2 MLJ 68*
*Nili anak Gumbang & Ors. v. Public Prosecutor [1985] CLJ (Rep) 885*
*Public Prosecutor v. Lee Ah Sam [1949] 15 MLJ 236*
*Public Prosecutor v. Mohamed Nor & Ors. [1985] 2 MLJ 200*
*Emperor v. Lachiram 1 LR 28 Bom 533*
*Liaw Kwai Wah & Anor v. Public Prosecutor [1987] CLJ (Rep) 163*

**Legislation referred to:**
Criminal Procedure Code, ss. 173(m)(2), 294
Criminal Justice Ordinance 1953, s. 3
Emergency Regulations 1948, reg. 5(1)
Firearms (Increased Penalties) Act 1971, ss. 2(1), 4
Interpretation Act 1967, ss. 2(3), 60
Penal Code, s. 298A

*For the appellant - Mat Ghani bin Abdullah, Legal Aid Bureau*
*For the respondent - Siti Aishah bt. Othman, DPP*

**JUDGMENT**

**Chong Siew Fai J:**

In this case the appellant appeals against sentence. Initially, he was unrepresented. On his own plea of guilty of the offence of exhibiting a firearm i.e., a shotgun in a manner likely to put any person in fear of death at the time of committing a robbery on 26 September 1986, he, on 16 May 1987, was sentenced to 3 years' imprisonment and 6 strokes of whipping.

Briefly, the facts of the case were that on 26 September 1986 at about 12.00 noon the appellant together with 3 other persons arrived at the Hock Huo Lung Shell Station (petrol station) at Jakar, Sarikei, by a car intending to rob the petrol station. Upon arrival, one of them requested that the petrol-tank of their car be filled with petrol, which was done. As they had insufficient money, only part of the price was paid. The 3 of them then left to find a friend to get more money leaving the appellant at the petrol station. They did not find the friend. Upon their return and upon being demanded by the petrol station owner for the balance of the price, the appellant replied that he had no money. The appellant then took out from the car a shotgun. Whilst shouting that the gun was real, he loaded it with cartridge. At that stage, the petrol station owner was scared and walked away. The appellant then fired the weapon hitting the glass wall of the office of the petrol station. In so doing, the appellant pointed the gun in the direction of a petrol station attendant who sat on a chair in front of the petrol station. The attendant then locked the drawer of a table in which money was kept and fled. After shouting for the key to which the owner replied that there was none, one of the members of the gang slashed the drawer of the table with a 'samurai sword'; and the appellant forced open the drawer and took away RM515 cash. They then left. The same afternoon they were arrested. The shotgun was stolen by one of them the previous day.

In the appellant's own Notice of Appeal against the sentence, the ground put forward is that the imposition of 6 strokes of whipping is manifestly excessive. In addition, he has also put forward, in his letter dated 9 July 1987, a number of factors which are personal in nature and which I do not propose to repeat here save saying that I have fully considered them.

Arising from the appeal, the learned Public Prosecutor wrote seeking revision of the case submitting that the sentence of 3 years' imprisonment was unauthorised by law and illegal in view of the mandatory sentence imposed by s. 4 of the Firearms (Increased Penalties) Act 1971.

So far as is relevant, s. 4 of the said Act provides:

> Any person who at the time of his committing ... robbery exhibits a firearm in a manner likely to put any person in fear of death or hurt shall be punished with imprisonment for life and with whipping with not less than six strokes.

In view of the seriousness of the matter, I, on 2 November 1987, adjourned the hearing to enable the appellant to have the benefit of legal representation. As a result, the appellant was represented by Encik Wan Mohamed Wan Ibrahim from the Legal Aid Bureau and a Petition of Appeal containing grounds of appeal was admitted and argued without objection from the Deputy Public Prosecutor Encik Abdul Rahman bin Sebli.

For the appellant it was contended that the learned trial President had failed to appreciate the legal meaning of the word "and" in s. 4 of the Firearms (Increased Penalties) Act 1971 and had erred in law in holding that the sentence of life imprisonment and whipping of not less than 6 strokes were mandatory.

A number of authorities were cited on behalf of the appellant: *Public Prosecutor v. Man bin Ismail* [1939] MLJ 161; *Public Prosecutor v. Lee Ah Sam* [1949] 15 MLJ 236; *Ng Chwee Puan v. Reg.* [1953] 19 MLJ 86; *Khor Seek Pok v. Public Prosecutor* [1958] 24 MLJ 170; *Public Prosecutor v. Wahab* [1964] 30 MLJ 322; *Jayanathan v. Public Prosecutor* [1973] 2 MLJ 68 and *Nili Anak Gumbang & Ors. v. Public Prosecutor* [1985] CLJ (Rep) 885.

With respect, all the above cases are on penal provisions in which the words "shall be liable to" are used in contrast to s. 4 of the Firearms (Increased Penalties) Act 1971 where the phrase is "shall be punished with ... and with ..." Those cases are, to my mind, clear distinguishable.

The case of *Public Prosecutor v. Lee Ah Sam* [1949] 15 MLJ 236, however, needs a little detailed discussion. There, Willan CJ in considering the penal provision of reg. 5(1) of the Emergency Regulations 1948 said:

> Finally, a comparison with the rather stronger wording of s. 396 of the Penal Code confirms our view that the whipping under reg. 5(1) is discretionary. The relevant words of s. 396 are "shall be punished with death or penal servitude for life ... and ... with whipping with a cat-o'-nine tails". It has never been suggested that the whipping under that section is mandatory and in our opinion it is not.

Relying on the above passage, Counsel for the appellant forcefully argued that the word "and" in s. 4 of the Firearms (Increased Penalties) Act 1971 must mean "or" and the form of penalty was discretionary. In *Lee Ah Sam's* case the said s. 396 did not appear to have been fully argued. Also, if one examines more closely the said s. 396, it will be noted that the death penalty prescribed there is with the alternative of "or penal servitude for life ...." This bore resemblance to the Emergency Regulations reg. 5(1) (i.e., "... punished with death or with penal servitude for life and whipping") which was called into question in *Lee Ah Sam's* case, *supra*, but is different from s. 4 of the Firearms (Increased Penalties) Act 1971 which provides no alternative form of penalty.

Counsel for the appellant also cited *Public Prosecutor v. Mohamed Nor & Ors.* [1985] 2 MLJ 200 and argued that the legal effect of the phrases "shall be liable to" and "shall be punished with" was the same and that despite the use of the words "shall be punished with", the Court still had discretionary power in meting out sentences. The case of *Mohamed Nor & Ors., supra,* was on s. 298A of the Penal Code as then existing i.e., before the amendment by Act A614/85. In the unamended form, it, unlike the instant case before me, provided for alternative forms of sentences of imprisonment (which might extend to 3 years), or fine or both. Moreover, s. 294 of the Criminal Procedure Code (relating to first offenders) was not then excluded from application. In that case the trial Court had seen it fit to apply s. 294 and on appeal the Supreme Court refused to interfere. In our instant case, the question of

applicability of the said s. 294 is not in issue. It was not even raised. In any event, the said section is clearly inappropriate for application having regard to all the facts and circumstances in the instant case. It is also my view that there is clear distinction between the phrases "shall be liable to " and "shall be punished with".

On the question of imprisonment for life, Counsel for the appellant also referred to s. 60 of the Interpretation Act 1967 which provides:

> A written law which prescribes a penalty for an offence shall be construed as providing that the offence shall be punishable on conviction by a penalty not exceeding the penalty prescribed.

However, this 1967 Act is not applicable where there is (a) express provision to the contrary; or (b) something in the subject or context inconsistent with or repugnant to its application (see s. 2(3) of the Act).

In the Firearms (Increased Penalties) Act 1971, apart from s. 4 thereof providing "shall be punished with imprisonment for life and with whipping with not less than six strokes", the term "imprisonment for life" also has its special meaning and excludes all other written law providing to the contrary. It reads: "imprisonment for life" means, notwithstanding s. 3 of the Criminal Justice Ordinance, 1953 and any other written law to the contrary, imprisonment for the duration of the natural life of the person sentenced. (See s. 2(1) of the 1971 Act).

Moreover, in view of the statutory meaning of the term "imprisonment for life" as provided i.e., imprisonment for the duration of the natural life of the person sentenced, I fail to see how a discretionary imprisonment sentence for a fixed term commensurate with the gravity of the offence committed could be imposed since it is impossible to ascertain with certainty the time the natural life of a person would end. This, in my opinion, strongly argues for the view that the life imprisonment sentence as defined is mandatory. The sentence of imprisonment for life in my opinion is a fixed one and is not the maximum that may be awarded so that lesser sentence of imprisonment may be imposed.

After considering all matters including submissions by Counsel, I am of the view that the penalty of imprisonment for life and whipping of not less than 6 strokes under s. 4 of the Firearms (Increased Penalties) Act are, upon conviction, mandatory. In this connection, I would point out in fairness to Counsel for the appellant that it was conceded that if whipping was held to be mandatory, 6 strokes would be the minimum.

In the view that I hold of the penalty being mandatory, grounds (iii) and (v) contained in the Petition of Appeal must fail. I am also of the view that there is no merit in ground (iv) of the appeal. The learned Sessions Judge was correct in taking public interest into consideration. Furthermore, in view of the mandatory punishment as I hold, an imprisonment term of 3 years is clearly wrong and unsustainable.

The language of s. 4 of the said 1971 Act is clear. It imposes a sentence of life imprisonment and whipping of not less than 6 strokes. In the result, the appeal of the appellant on the grounds as submitted must be dismissed.

I now come to the question of revision. It cannot be disputed that the power of revision of this Court is a discretionary power. No argument was advanced in this respect. In *Emperor v. Lachiram* 1 LR 28 Bom 533 Jenkins CJ speaking of the guiding principles for the exercise of the revisionary powers, said:

> this controlling power of the Court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly.

In *Liaw Kwai Wah & Anor v. Public Prosecutor* [1987] CLJ (Rep) 163 Abdul Hamid CJ said: (At p. 166):

> The High Court's power sitting in revision is discretionary. As it is, it must therefore be exercised judicially and within the limits and in the spirit of the legislation.

(At p. 166):

> The law is clear in that the Public Prosecutor is vested with a right to appeal against any sentence which he feels is manifestly inadequate. The power of revision is therefore to be used sparingly and should remain a discretionary power to be exercised primarily for purposes of correcting a miscarriage of justice.

While the general rule is that the High Court in revision does not enhance a sentence even though illegality was committed by the lower Court where the sentence passed involves substantial punishment, the Court nevertheless would have to act where the sentence is improper and is not in accordance with law. Section 173(m)(2) of the Criminal Procedure Code requires lower Courts to pass sentences according to law.

In the instant case, having regard to the mandatory sentence enacted in s. 4 of the said Act and having considered the facts which were admitted by the appellant and which fell within the said s. 4, the 3-year imprisonment sentence, in my view, is clearly improper, and unauthorised by or not according to law. In the result, I am constrained by the said s. 4 to alter the 3-year jail sentence to one of life imprisonment. The sentence of 3-year imprisonment by the lower Court is set aside. The mandatory 6 strokes of the whipping are affirmed.

Finally, I would make an observation. Some time ago, arising out of an appeal involving abettment of robbery with the use of firearms (Sibu Criminal Appeal No. 11 of 1985), I had occasion to come across a connected case also involving robbery with use of firearms (Sibu Sessions Court Criminal Case No. SC/14/84). Though the facts and circumstances in the latter case above-mentioned appears no less serious than those in the instant case, the accused was charged under a different law attracting lesser punishment. I wish to make it absolutely clear that in so commenting I am not in any way levelling criticism on anyone. Indeed, there might well be adequate reasons justifying different treatment of the two cases. I mention this in order that the matter would be given such due consideration as it might perhaps deserve should there come a time when the executive power of clemency is pleaded in aid. Of course, valid reasons, if any, (of which I have no knowledge) for treating the two cases differently cannot be ignored.

Also found at [1988] 2 CLJ 873